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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-751

VINCENT PACELLI, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

VINCENT PACELLI, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vincent Pacilli, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals is reported at 521 F. 2d 135. A copy appears as Appendix B herein.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 24, 1975. A timely petition for

rehearing was denied on September 22, 1975. On October 15, 1975, Mr. Justice Marshall extended the time to file this petition to and including November 21, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. *Whether, in a federal criminal prosecution for conspiracy resulting in death, where the only evidence connecting defendant to the crime is the testimony of an immunized alleged co-conspirator who is shown by uncontradicted evidence to be a drug addict, a pathological liar, and seriously mentally ill, it is fundamentally unfair to deny a defense motion to psychiatrically examine the witness.*

2. *Whether, in a prosecution based on the uncorroborated testimony of an alleged co-conspirator, it is fundamentally unfair to exclude any and all expert psychiatric testimony, based upon observation of the witness and study of medical, biographical, prison and probation records, that the Government witness is (a) a drug addict, (b) a pathological liar, (c) a psychopath, (d) unable to distinguish reality, (e) unable to respect an oath, (f) seriously ill and in need of medical treatment.*

STATEMENT OF THE CASE

Petitioner was convicted on both counts of a two-count indictment, in a jury trial before Judge Charles Stewart in the Southern District of New York, on January 31, 1975. Count 1 charged that, in violation of 18 U.S.C. § 241, petitioner and unindicted co-conspirator Barry Lipsky conspired to deprive a prospective federal witness of her right to testify, and that the conspiracy caused her death. Count 2 alleged that petitioner impeded a federal witness, contrary to

18 U.S.C. § 1503, by killing her. Judge Stewart imposed a life sentence on Count 1, to be served consecutive to a thirty-five year sentence petitioner is presently serving for violations of the narcotics laws. A five year concurrent sentence was imposed on the second count.

The Government established without dispute that an unsuccessful effort was made to serve a subpoena on Patsy Parks on February 3, 1972, to testify in a federal narcotics prosecution of petitioner, petitioner's wife, and two other defendants who were friends and neighbors of Parks. Informed by her roommate about the marshall's effort to serve her, Parks discussed the matter with friends, and suggested she should leave town (T. 150, 156).* She did not want to testify because, she said, she had already been an F.B.I. informer (T. 139) and was afraid even her boyfriend might kill her if he knew (T. 150).

The night of February 3rd, she went looking for petitioner, to seek his advice, although she hardly knew him (T. 163), had seen him only once or twice. In the course of that quest, she met Barry Lipsky in a nightclub.

The next day, Parks' body was found in Long Island, New York. Her throat had been cut, she had been stabbed nine times (T. 1004) and her body had been burned by gasoline flames (T. 998).

Lipsky, who had confessed some implication in the murder to Nassau County authorities, was originally charged with first degree murder by the State. Through intervention of federal authorities, however, Lipsky was ultimately permitted to plead quilty to manslaughter and received a sentence of 0 to

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* Reference is to the trial transcript.

20 years. In addition, in return for his cooperation, the federal authorities granted him informal immunity from federal prosecution for the murder, numerous narcotics offenses, and various other crimes.

As part of his deal with the Government, Lipsky testified below. He swore that petitioner had actually orchestrated the murder, wielded the knife and poured gasoline over the victim's body. According to Lipsky, his role has been limited to buying the gasoline, luring Parks into the car, lighting the match to the gasoline, driving the car, and helping to dispose of the evidence.

The defense theory was that Barry Lipsky alone, or in league with someone other than petitioner, had murdered Parks. It was thus an attack on the credibility of Lipsky's testimony which implicated petitioner. According to the defense, petitioner had no motive to kill Parks, as proved by her grand jury testimony, which did not implicate him in any crime (T. 74), and the fact that Parks hardly know petitioner (T. 163). The defense also relied on serious inconsistencies in Lipsky's testimony, inherent improbabilities, and external contradictions. The thrust of the defense, however, was that Lipsky was crazy, and had a unique combination of perverted drives, needs and propensities, which would make it likely that he would commit such a bizarre murder himself, then try to pin responsibility on someone else.

On cross-examination, the defense sought to elicit from Lipsky that (1) in a previous prosecution of petitioner for violation of the narcotics laws, Lipsky had perjuriously implicated petitioner in a narcotics transaction in which petitioner had played no part, (2) in two previous prosecutions of petitioner for violations of the narcotics laws, Lipsky had,

with full knowledge of the prosecutor, perjuriously denied any promises or understandings with the Government, when in fact he had been granted immunity by the very prosecutor who elicited his perjury; (3) one month before Patsy Parks was murdered and burned, Lipsky suggested to a friend of his that two witnesses against the friend be "burned." The trial judge precluded all these inquiries.

The precluded cross-examination was complained of on appeal. The court, below,holding that all the rulings were discretionary, affirmed.

Motion for Psychiatric Examination

Prior to trial, petitioner moved for a psychiatric examination of Lipsky, the Government's witness (A. 13)*. A related motion to disqualify Lipsky was also made (A. 57). Alleging serious reasons to doubt Lipsky's mental competence to be a witness and, in any event, that a psychiatric examination would disclose substantial evidence bearing upon Lipsky's credibility, petitioner sought permission to have Lipsky examined by a psychiatrist approved by the court. In support of the motion, petitioner proferred numerous documents:

a. Transcripts of conversations in 1972 between Lipsky's attorney and an Assistant United States Attorney, wherein they agreed to Lipsky's being a Government witness, then discussed his mental condition and competence as a witness. Therein, Lipsky's attorney said he intended to have Lipsky examined by a "whole battery of psychologists," as there was "something wrong with him." Even if not "beastly insane," he is "capable of going crazy as hell. . . . If he's gonna be any good, he's got to be competent." The prosecutor agreed with

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* Reference is to the Appendix in the Court of Appeals.

these observations, acknowledging that the prosecution "can't use a screwball." The attorney observed that Lipsky was becoming "edgy". The prosecutor agreed, saying "It's more noticeable." Both expressed concern for Lipsky's "emotional stability." (A. 15)

b. An affidavit filed by Lipsky's attorney in state court, more than six months after the preceding conversations, wherein the attorney swore that Lipsky was mentally incompetent to stand trial, being unable to communicate with his attorney. The affidavit recited, *inter alia*, that, before his arrest, Lipsky had fired a gun into a television set to silence the announcer and had thrown two scales into the Atlantic because they refused to reveal that he had lost weight (A. 18).

c. Lipsky's sworn testimony in prior proceedings wherein he had admitted consulting a psychiatrist, banging his head against a wall in anger, committing perjury before a federal grand jury in Florida and in two previous prosecutions against this petitioner, being a regular user of cocaine and other drugs since 1967, being an afficianado of horror programs, even to the extent of adopting as an alias the name of one of his favorite horror program characters (A. 16).

d. Letters by Lipsky's attorney to various people concerning Lipsky's sanity, *e.g.*, to the jail warden asking help for "this mentally disturbed man in keeping what sanity he has" (A. 25), to the state prosecutor, noting Lipsky is "mentally deteriorating very rapidly" and warning that Lipsky would be useless if not competent (A. 27).

e. A letter from Lipsky to his sister wherein Lipsky says, "I am completely without emotional feelings that most 'straight' people have. . . . I am a violent, vindictive, warped-minded cynic, of a magnitude that you have absolutely no

conception of." Noting that he was then (July, 1972) being incarcerated with "'nuts' or psychos", Lipsky told his sister, "I am probably closer to where I actually belong than ever before." He continued, however, that "the things these lunatics do and say only amuses me and I wish I could . . . go near them to 'steam them up' and laugh at them. . . ." (A. 30)

Petitioner's pre-trial motion, which was denied, was renewed at trail, during cross-examination of Lipsky. In addition to the evidence of mental illness adduced pre-trial, petitioner had elicited the further facts that Lipsky had put a pistol to his brother's head to win a fight (A. 353), struck his hand against walls in anger at least a dozen times (A. 356), had frequent temper tantrums (A. 356). Lipsky also used numerous aliases from horror programs, *e.g.* "Mr. Graves," "Mr. Holmes," "Morris Stroud," "Wart" (A. 410), amused himself by making faces at the television set and making gruesome faces and noises at children to scare them (A. 681). It was also proved that Lipsky signs cards and letters with a claw (Def. Ex. P).

Admitting that his mental condition deteriorated rapidly since he was jailed for the murder in March, 1972 (A. 359, 365), Lipsky also acknowledged taking cocaine, marijuana, hashish, barbituates and alcohol, in various combinations, from 1967 until 1972 (A. 392, 400). Indeed, he admitted taking barbituates during petitioner's trial (A. 264), and banging his hand against the wall and crying in the witness room (A. 398).

Lipsky also admitted to a perverse pattern of dishonesty, including stealing books from a classmate (A. 399), stealing money from his mother and forging checks on her account (A. 279), a large number of bizarre swindles, and a nearly

unbroken record of lies and perjuries in legal proceedings since 1970.

When asked what the oath meant to him, rather than referring to any obligations, Lipsky said, "You sit here and swear to tell the truth." (A. 423). He said he did not know the meaning of "morally" (A. 362).

Petitioner also informed the trial judge that he had a psychiatrist in the courtroom who had suggested various lines of cross-examination which the court had precluded, *e.g.*, about Lipsky's admitted nightmares, which were relevant to psychiatric evaluation of Lipsky's competence and credibility. Petitioner also informed the court that the psychiatrist had tentatively diagnosed Lipsky as a "psychopath, a pathological liar, an egomaniac." The court again denied the motion, for the inexplicable reason, "[Y]ou have not made out a good enough case." (A. 630)

On appeal, the Court of Appeals relegated this issue to a footnote, affirming the denial as within the trial judge's discretion (App. p. 5096, n. 4).

Wholesale Exclusion of Psychiatric Testimony

Thwarted in its efforts at a psychiatric examination, the defense offered the testimony of a distinguished psychiatrist, one normally employed as an expert witness by the Department of Justice.[1] The psychiatrist, Dr. Abrahamsen, based his analysis on a three-day observation of Lipsky as he testified in the courtroom (A. 749), studying a transcript of that

[1]See *United States* v. *Baird*, 414 F. 2d 700 (2d Cir. 1969); *United States* v. *Weiser*, 428 f. 2d 932 (2d Cir. 1969); *United States* v. *Levy*, 449 F. 2d 769 (2d Cir. 1971).

testimony (A. 745), numerous letters by Lipsky (A. 743), medical records (A. 31, 35, 77), probation reports (A. 63), medical and family histories (A. 79). On the basis of all these data, Dr. Abrahamsen testified, in an offer of proof, that Lipsky was "mentally ill" (A. 749), a "psychopathic personality" (A. 751), a "very sick man" (A. 759), "mentally diseased" (A. 821), with what psychiatrists refer to as a "character disorder" (A. 823). Lipsky shares with psychotics (A. 757) an inability to distinguish reality (A 751), is abnormally self-serving, highly egocentric and narcissistic; truth to him is always secondary (A. 751, 1142). Indeed, his reality, i.e. his "truth" is simply what seems to serve his interests (A. 752, 759). He cannot tell the truth unless it perfectly concides with his own interests, as he perceives them (A. 759), and he has a distorted perception of self-interest (A 761). Lipsky is a pathological liar (A. 791), violent, vindictive, preoccupied with horror, and is unable to accept blame for his own conduct. On the contrary, he "blames everyone else" for what he has done (A. 762).

The psychiatrist also interpreted jail records of drug dosages, which records were otherwise incomprehensible. The records indicated very strong recent dosages of Valium and Dalmane (A. 789), establishing present drug addiction and mental illness (A. 789-90, 807-8).

The trial judge ruled out all the foregoing testimony, even that concerning drug dosages and drug dependency. The Court of Appeals affirmed, holding the matter to be one of discretion.

REASONS FOR GRANTING THE WRIT

1. *The decision below is grievously wrong, anachronistic, and fundamentally unfair in matters vital to the integrity of the federal criminal process.*

In prosecuting petitioner for what was essentially a murder upon the uncorroborated testimony of Barry Lipsky, the Federal Government impinged upon the clear policy of the State of New York, which has the core concern for crimes of murder, for that State holds unequivocally that no conviction can be obtained upon such testimony. *People* v. *Hayes*, 325 N.Y.S. 2d 815 (1971).[2] Even where a federal prosecution does not so clearly clash with state policy, however, a prosecution based on the testimony of an alleged accomplice is fraught with possible injustice and any claimed errors must be scrutinized with great care. *United States* v. *Persico*, 305 F. 2d 534 (2d Cir. 1962). *Cf.*, *Glasser* v. *United States*, 315 U.S. 60, 67 (1942). The court below, however, abdicated its responsibilities and set back the course of justice at least half a century.

A. The Right to a Psychiatric Examination

There is no doubt of the court's authority to order a mental examination of a prosecution witness, *Carrado* v. *United States*, 210 F. 2d 712, 721 (D.C. Cir. 1954), and this authority becomes a duty whenever there is reasonable doubt as to the competence or the credibility of the witness. *State* v. *Butler*, 27 N.J. 560, 143 A. 2d 530 (1958); *United States* v. *Butler*, 481 F. 2d 531 (D.C. Cir. 1973); *United States* v. *Benn*, 476 F. 2d 1127, 1130 (D.C. Cir. 1973).

More than a quarter century ago, Wigmore called for the routine psychiatric examination of prosecution witnesses where, by reason of dependency on the prosecution or the nature of the charge, the claims are inherently suspect

[2] Petitioner has never been prosecuted for a state offense.

3 Wigmore, Evidence § 924(a) (3d ed. 1940). Scholarly and judicial authorities are clearly in accord. See Conrad, *Mental Examination of Witnesses*, 11 Syracuse L. Rev. 149 (1960); Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 75 (1965); Slovenko, *Witnesses, Psychiatry, and the Credibility of Testimony*, 19 U. of Fla. L. Rev. 330 (1958); Comment, 59 Yale L.J. 1324 (1950). While no one claims that a defendant has a right in every case to have the witness against him examined, there is plainly such a right where some evidence of mental abnormality exists and the charge is a very serious one, *State* v. *Butler, supra, Taborsky* v. *State*, 116 A. 2d 433 (Conn. 1955), or the witness is a heavy part of the prosecution's case. *United States* v. *Butler, supra*; Comment, 59 Yale L. J. 1324 (1954).

The evidence submitted below in support of petitioner's motion was not only overwhelming proof of psychological abnormality, if not insanity, it was also incontrovertible proof of prolonged narcotics use. Lipsky admitted that in addition to other drugs, he snorted cocaine "on almost a daily basis" beginning in 1967 (A. 393). He sometimes took cocaine twenty times a day (A. 395). Citing medical sources, the District of Columbia Circuit, in *Hansford* v. *United States*, 365 F. 2d 920, 922 (D.C. Cir. 1966), recently observed that:

> "Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as an acute brain syndrome, which is a 'basic mental condition characteristic of diffuse impairment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual func-

> tions including comprehension, calculation, knowledge and learning, impairment of judgment; and lability and shallowness of affect."

As to cocaine users in particular, it has been noted that:

> Prolonged and heavy cocaine use can produce severe psychological and physiological effects. One frequent psychological result is hallucinations. In some cases, prolonged use causes paranoid delusions. Some commentators claim that in these states of hyperexcitement and paranoia, the cocaine user is extremely dangerous and potentially violent. McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug,* 58 Cornell L. Q. 537, 551 (1973).

Still, as the court noted in *Hansford, supra,* 365 F. 2d at 923:

> "The effects of narcotic use will vary depending on the amount of drugs taken, the degree of tolerance developed by the individual, and the idiosyncratic reaction of the person to the drugs. For this very reason, only by a hearing can it be determined whether any particular [person] is incompetent because of his use of drugs."

The defense was denied that hearing, and denied access or inquiry into the relationship of Lipsky's drug usage to his other mental disorders. In refusing the reguested examination, the court not only denied the defense access to evidence relevant to the jury's assessment of credibility, it neglected its solemn duty to determine the testimonial competence of witnesses. *United States* v. *Crosby,* 462 F. 2d 1201 (D.C. Cir. 1972). Not only was Lipsky incontrovertibly proved to be a mentally ill drug addict, he was a persistent perjurer who

had never been and did not expect to be prosecuted for his perjury, even that directed against the petitioner in prior prosecutions. There was, therefore, no basis whatsoever for believing that Lipsky was a competent witness. He utterly and totally lacked "a sense of moral responsibility . . . to speak the truth", which is a requisite of testimonial competence. 2 Wigmore, Evidence § 495 (3d ed. 1940).

Apart from Lipsky's incompetence, however, his mind was a storehouse of information relating to his credibility. Since he was literally a captive of the Government, the Government had exclusive dominion over this evidence. In denying the defense access to such evidence, the court effectively suppressed evidence and made a fair trial impossible. *Cf. Washington* v. *Texas,* 388 U.S. 14, 19 (1967); *Giles* v. *Maryland,* 386 U.S. 66, 99 (concurring opinion of Mr. Justice Fortas) (1967).

B. The Expert's Testimony

Petitioner offered a highly qualified, concededly expert psychiatrist to testify concerning Lipsky's competence and credibility. The adequacy of the data upon which the opinion was based was neither disputed nor disputable. The sole reason for excluding the doctor's testimony was the preposterous assertion that it would be "of no use to the jury" (A. 845).

The admissibility of medical opinion relating to testimonial competence or credibility has been clear for a quarter century. *United States* v. *Hiss,* 88 F. Supp. 559 (SDNY 1950), *affd.* 185 F. 2d 822 (2d Cir. 1950), *cert. den.* 340 U.S. 948 (1951); *Taborsky* v. *State,* 95 A. 2d 59 (Conn. 1953); *United States* v. *Partin,* 493 F. 2d 750 (5th Cir. 1974); McCormick, Evidence § 45, at 95 (2d ed. 1970). Indeed, exclusion of evi-

dence similar to that offered below was held reversible error more than half a century ago. *Ellarson* v. *Ellarson*, 198 App. Div. 103, 190 N.Y.S. 6(1921); *State* v. *Pryor*, 74 Wash. 121, 132 P. 874 (1913).

The literature of psychiatry makes clear that a jury is particularly needful of medical guidance in assessing the credibility of a psychopathic liar like Lipsky. As if writing about Lipsky, Henry Weihofen said of psychopathic personality (sociopathy):

> It can have a material effect on credibility. Although capacity to observe and recollect is apparently unimpaired, the sense of moral responsibility to narrate truthfully may be affected. This may render the witness careless with the truth, impulsive, and undependable. Because he is so utterly devoid of any sense of guilt, he feels justified in telling all sorts of lies to escape the consequences of his acts.
>
> The sociopath may harbor unconscious hostilities that lead to false accusations of biased testimony. He may crave the publicity that his accusations give him or, driven by unconscious motives, may indulge in repetitious lying which is wholly irrational and without any discernable end. He may appear normal, mild-mannered, and intelligent. His lies, indeed, are often told with more conviction than normal persons show. Even when his lying is exposed, he is able to make quick adjustments and thoroughly mislead the layman. Even the psychiatric expert has the greatest difficulty in recognizing the existence of the condition or assessing the person's credibility." Weihofen, *Testimonial Competence and Credibility*, 34 Geo. Wash. L. Rev. 53, 86 (1965).

Accord, Davidson, *Testimonial Capacity*, 39 B.U.L. Rev. 172, 179 (1959), 1 American Handbook of Psychiatry 581-3

(Arieti, ed. 1959), Redlich and Freedman, Theory and Practice of Psychiatry 392 (1966).

The jury may of course disregard an expert's testimony, or it may accept the testimony but believe the witness anyway. It is simply outrageous, however, to hold that the jury may not *hear* the expert, and consequently that the Government may convict a defendant of murder and sentence him to life on the testimony of a psychopath while denying the defense a right to have the jury hear its medical evidence.

Where, as here, the heart of the defense is that the witness himself was the murderer, and that both the crime and the testimony laying the crime on the defendant were the products of a disordered mind, exclusion of the doctor's testimony denies the petitioner the right to put on a defense. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Webb* v. *Texas*, 409 U.S. 95 (1972). *Cf. Davis* v. *Alaska*, 415 U.S. 315 (1974).

Mental disorders are so peculiarly the subject of expertise that lay opinion on the matter is often denigrated or even excluded. The jury in the present case undoubtedly rejected petitioner's defense because they heard no medical evidence to back it up. They were entitled to assume, and surely did assume, that if there was anything to petitioner's claim that Lipsky was a crazy murderer, the defense could have found a psychiatrist to support it. By excluding the evidence, therefore, the court virtually directed a verdict of guilty. Conferring upon a trial judge the unfettered "discretion" to reject such evidence is tantamount to repealing the right to trial by jury.

2. *The Decision Below is in Conflict With Other Circuits*

In holding that a psychiatric examination of the prosecution witness is discretionary, even where the witness is a proven drug addict and the witness is uncorroborated, the decision below conflicts with decisions of the Court of Appeals for the District of Columbia. See *United States* v. *Butler,* 481 F. 2d 531 (1973).

In rejecting expert evidence that the prosecution witness is mentally ill, a pathological liar, and a drug addict, the decision below is in conflict with the Fifth Circuit, *United States* v. *Partin,* 493 F. 2d 750 (1974), and the District of Columbia Circuit, *United States* v. *Crosby,* 462 F. 2d 1201 (1972).

3. *The Decision Below Brings the Administration of Federal Criminal Justice into Disrepute.*

Although from time to time reversing egregious State Court decisions, this Court has recently manifested a willingness to permit the United States Courts of Appeal to become the courts of last resort in criminal cases. The decision below is the sequela of such a tendency. The court below felt free to abdicate its responsibilities under the rubric of trial judge discretion. The trial judge, in the alleged exercise of that discretion, refused the defense access to vital evidence—a psychiatric examination—and kept from the jury other vital evidence—the expert's diagnosis—and thus deprived petitioner of a meaningful jury trial, all in a case consisting of the uncorroborated testimony of an immunized accomplice who admittedly committed perjury as a Government witness in two prior prosecutions of this petitioner. The citizenry can simply have no faith in such a process. Justice must not only be fair,

it must appear to be fair. *Offut* v. *United States,* 348 U.S. 11 (1954).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of September, one thousand nine hundred and seventy-five.

Present: Hon. Tom C. Clark
Associate Justice

Hon. Water R. Mansfield

Hon. William H. Mulligan
Circuit Judges

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v. 75-1149

VINCENT PACELLI,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant, Pacelli.

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1153—September Term, 1974.

(Argued June 24, 1975 Decided July 24, 1975.)

Docket No. 75-1149

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT PACELLI, JR.,

Defendant-Appellant.

Before:

CLARK, *Associate Justice,**
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Hon. Charles E. Stewart, *J.*, entered after jury verdicts of guilty on Count One of conspiracy to violate the civil rights of a Government witness by causing her death in violation of 18 U.S.C. § 241, and on Count Two of endeavoring by force to impede the witness's testimony and injuring her on account of her having testified before a grand jury in violation of 18 U.S.C. § 1503.

Affirmed.

* United States Supreme Court, retired, sitting by designation.

JAMES E. NESLAND, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, John D. Gordan, III, Asst. United States Attorney, of Counsel), *for Appellee.*

STEVEN B. DUKE, New Haven, Connecticut (Pierce O'Donnell, New Haven, Connecticut, on the brief), *for Defendant-Appellant.*

MULLIGAN, *Circuit Judge:*

Vincent Pacelli, Jr., was convicted on January 31, 1975 after a two-week jury trial before Hon. Charles E. Stewart, United States District Judge for the Southern District of New York, on both counts of a two-count indictment. Pacelli was charged in Count One with a conspiracy with Barry Lipsky to violate the civil rights of a Government witness, Patsy Parks, by causing her death before she could exercise her right to testify, in violation of 18 U.S.C. § 241. Count Two charged the use of force to impede her testimony, in violation of 18 U.S.C. § 1503. On February 28, 1975, Judge Stewart sentenced Pacelli to a term of life imprisonment on Count One and to five years imprisonment on Count Two, to be served concurrently with each other but consecutively to a twenty-year term and a fifteen-year term of imprisonment on two prior narcotics convictions. Pacelli now appeals from the judgment of conviction.

I. THE FACTS

The appellant here had previously been convicted of the same crimes involving the murder of Patsy Parks but that conviction was reversed by this court, *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974), and Pacelli's petition

for certiorari on certain of the issues in that case was denied by the Supreme Court, 419 U.S. 826 (1974). Judge Mansfield's opinion for this court on the prior appeal details the facts which led to the homicide of Miss Parks. In that case as well as this, the prosecution hinged upon the testimony of Barry Lipsky, who participated in the killing. Pacelli did not testify in his own behalf in this trial and his defense, as in the initial trial, consisted of an attack on the credibility of Barry Lipsky. We find no reason, therefore, to repeat the sordid story except in summary fashion.

Patsy Parks, under subpoena, testified before a grand jury in the Southern District of New York on May 27, 1971 about a box, apparently containing money, which she had kept for Pacelli in her apartment. An indictment charging Pacelli, his wife and two others with narcotic violations was returned by the grand jury. The case was set for trial on February 8, 1972. On February 3, 1972, Government agents sought unsuccessfully to serve Parks with a subpoena for her appearance at the Pacelli trial. Lipsky, who was advised by Parks of the attempted service and her desire to contact Pacelli, testified that he drove to Pacelli's apartment in New Rochelle in the early morning of February 4, 1972. Upon being advised of the Parks subpoena, Pacelli stated: "It's that box. It's that God-damned box. She has been to the grand jury and she ratted me out. I know what I have to do." The two men then drove in a rented car to New York, stopping to purchase four gallon cans of gasoline, and then proceeded to the "Hippopotamus," a New York discotheque where Parks was drinking with friends while waiting to be contacted by Pacelli. Lipsky told Parks where Pacelli was parked and the three then proceeded to a remote area of Massapequa, New York. Enroute, Pacelli discussed the narcotics case with Parks and offered her

money to leave town, which she declined. Finally, Pacelli stabbed Parks in the throat and several times in the chest with a knife until she was dead. Her body was then doused by Pacelli with the gasoline purchased earlier and set on fire, with Lipsky lighting the match. The men then returned to Pacelli's apartment in New Rochelle, disposing of Parks's effects, the empty gasoline cans and the knife and cleaning the car to eliminate bloodstains. Parks's body was found on the morning of February 4th and was identified a week later by footprints and dental charts.

Although the Government's case was dependent upon Lipsky's detailed testimony, it was corroborated in some respects by other witnesses. Parks was placed by witnesses in the Hippopotamus on the night and at the time testified to by Lipsky; the night attendant at the gasoline station identified Lipsky as the purchaser of four gallon cans of gasoline at about 2:30 a.m. one morning; a knife was found in the mud of a bay area two blocks from Pacelli's residence where Lipsky stated they had disposed of the murder weapon. There was also evidence that the same rented car in which the murder was committed was again rented by Pacelli's drug partner, Al Bracer, on February 16, 1972 and was found engulfed in flames two days later in Fairfield, New Jersey, at a time when Lipsky was hiding in Florida. Chemical inspection disclosed that there was gasoline throughout the interior of the car and indicated, although not conclusively, that traces of blood were present on the floor carpet.

II. Limitations on Cross-Examination

Appellant argues that the trial court erred in precluding the defense from cross-examining Lipsky with respect to three matters of direct significance in assessing his credibility. It is well understood that the admission of evidence on cross-examination is a matter within the dis-

cretion of the trial judge. *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973) (*per curiam*). Here almost 400 pages of the transcript and two-and-a-half days of trial time were devoted to Lipsky's cross-examination. It is significant that a comparatively small amount of time (perhaps one-third of the cross-examination) was devoted to challenging Lipsky's eyewitness account of the fatal assault upon and the cremation of Patsy Parks. The bulk of the examination was directed to an attack upon Lipsky's credibility and his hostility to Pacelli. In determining whether or not independent evidence of Lipsky's motivation for perjury was admissible, we obviously cannot ignore the evidence already before the jury, as well as that which was available to the defendant and would not have involved diversionary forays into extraneous matters. *United States* v. *Kahn*, 472 F.2d 272, 279 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States* v. *Bowe*, 360 F.2d 1, 16 (2d Cir.), cert. denied, 385 U.S. 961 (1966). An examination of the record before us indicates that the jury had ample evidence with which to support the defendant's proposition that Lipsky was a vicious criminal with every motive to inculpate Pacelli.

On direct examination, Lipsky related in detail the horrible execution of Patsy Parks by Pacelli but also discussed his own participation which commenced with alerting the defendant to her appearance before the grand jury. He furthermore obviously knew of Pacelli's intent to kill her; he purchased the gasoline, he took a book of matches from the Hippopotamus and he put the match to the gasoline which caused the conflagration aimed at destroying the corpse and making its identification impossible. Also on direct examination, he admitted to his alliance with Pacelli in the distribution of narcotics. On cross-examination, he admitted that he had taken illegal

drugs and was presently using medicinal drugs; he also admitted that he had pleaded to a stock fraud charge in cooperation with the Government. He admitted lying to his lawyers, to juries and to a probation officer who he knew was preparing a pre-sentence report which was to be submitted to a sentencing judge. He admitted to selling stolen books in college and forging his mother's checks. He admittted that his attorney had told him on April 11, 1972, before he went before the grand jury, that an agreement had been reached with the Government that he had complete transactional immunity and would not be prosecuted for anything he told the Government, not for "any damn thing." He admitted that he lied in two previous federal trials in 1972 about his understanding as to whether or not he would be prosecuted. He further admitted that he thought that by testifying against Pacelli he would "get off relatively easy."

In view of this elicitation of the litany of Lipsky's licentious behavior, his corruption and his past perjury, the argument that cross-examination was erroneously restricted in the very areas in which his vulnerability had already been exposed becomes insubstantial and unconvincing.

Judge Stewart, it is urged, erroneously refused to permit cross-examination of Lipsky with respect to his testimony in a narcotics trial in June 1972, which, it is alleged, falsely implicated Pacelli. The testimony sought to be introduced was that of one Joseph Nunziata, a deceased New York City detective, who testified in a case involving another defendant, Valentine, which ended in a mistrial. Lipsky testified that he, Valentine and Pacelli had conducted a drug transaction in a New York cafe, "Yellowfingers." Nunziata's testimony, Pacelli contends, was that he had observed both Valentine and Lipsky at the scene, but did not observe Pacelli in the restaurant. On denying Pacelli's post-trial motion for a new trial based on the

exclusion of this evidence, Judge Stewart found that this testimony did not establish that "Pacelli was not in fact at the restaurant for at least some of the time in question." A reading of the testimony reveals that Nunziata had a clear view of Lipsky and Valentine, but does not indicate that he could observe all of the persons in the Yellowfingers cafe at the time or that he would have recognized Pacelli had he been present. Nunziata's death, of course, made further explication impossible. Aside from the failure of the Nunziata testimony to establish inconsistency or perjury on Lipsky's part, there was such a plenitude of evidence otherwise demonstrating Lipsky's villainy that we find no abuse of discretion in the action by the court in precluding the admission of the Nunziata testimony. *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), cert. denied, 409 U.S. 863 (1972).[1]

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1 Pacelli's brief argues that this testimony was also essential in undermining Lipsky's claim, which was "inextricably related to his testimony about the murder," that he was associated with Pacelli in the narcotics business. Aside from the inconclusive nature of the testimony, the nexus between Lipsky's testimony in the Valentine case and the murder of Parks immediately following her grand jury testimony and subpoena in the Pacelli narcotics trial is, at best, remote. In any case, the record establishes from the testimony of Susan Weyl that Lipsky and Pacelli used her apartment in November and December 1971 to cut and package heroin and cocaine.

The argument that the testimony was essential to establish the animus of Lipsky toward Pacelli is not persuasive. In *United States* v. *Pacelli*, *supra*, 491 F.2d at 1118, this court reversed the prior conviction because the Government had failed to disclose a letter from Lipsky to the United States Attorney's office in which he indicated his willingness to testify against Pacelli. In the retrial below, the letter which had been claimed to be vital to impeach Lipsky was not offered in evidence because it would have revealed to the jury that Lipsky's perjured testimony was given in prior trials in which Pacelli was a defendant.

The appellant relies upon *United States* v. *Haggett*, 438 F.2d 396 (2d Cir.), cert. denied, 402 U.S. 946 (1971). This court has characterized the *Haggett* case as one "of almost complete preclusion of cross-examination as to a witness' motive for testifying, see *United States* v. *Haggett*, *supra*, 438 F.2d at 399-400 . . . ." *United States* v. *Blackwood*, *supra*, 456 F.2d at 530. That is certainly not the case here.

As we have already indicated, the jury was fully aware from Lipsky's cross-examination that he had committed perjury in two prior criminal cases. His previous testimony in the June and December 1972 trials was read to the jury. Lipsky admitted that although he knew he had complete immunity, he lied in answering that he had no immunity. Counsel for Pacelli was, however, precluded below from attempting to establish that Lipsky's perjury was suborned by an Assistant United States Attorney. It is urged that the alleged subornation would be material to establish that Lipsky felt free to lie and invent false testimony because he knew that the Government was willing to condone his perjury. We note that in the prior *Pacelli* appeal the same argument was made and was rejected by this court. *United States* v. *Pacelli, supra,* 491 F.2d at 1120. Although it does not appear in the record, on the argument of this appeal the Government brought to our attention that charges of professional misconduct against the Assistant United States Attorney for the very incidents urged here as outrageous have been examined by the Association of the Bar of the City of New York and that the Assistant has been exonerated. Aside from this, we deem it well within the discretion of the trial judge for him to have avoided the sidetracking which would inevitably have resulted in diverting the jury from the issue of Pacelli's guilt to what, in effect, would have constituted a separate fact-finding venture as to whether or not a particular Assistant United States Attorney knowingly permitted Lipsky to perjure himself in prior trials. See *United States* v. *Trejo,* 501 F.2d 138, 140 (9th Cir. 1974); *United States* v. *Kahn, supra,* 472 F.2d at 279; *United States* v. *Bowe, supra,* 360 F.2d at 16. See also *Smith* v. *Illinois,* 390 U.S. 129, 132 (1968); *United States* v. *Catalano,* 491 F.2d 268, 273 (2d Cir.), cert. denied, 419 U.S.

825 (1974); *United States* v. *Mahler*, 363 F.2d 673, 678 (2d Cir. 1966).[2]

Finally, it is urged that the trial court committed reversible error in refusing to permit defense counsel to ask Lipsky whether he had suggested to one Bruce Gordon in January 1972 that he "burn" two witnesses. The evidence, it is argued, not only would have established Lipsky's tendency toward violence but also would have undermined his story that his role in the Patsy Parks murder was passive and was motivated by his fear of Pacelli. The fact that Lipsky was a hardened criminal not adverse to violence was made evident to the jury throughout the trial. Lipsky admitted buying the gasoline and lighting the match which cremated the body. There is no question but that Lipsky was a principal in the murder.[3] There is nothing to justify the argument that Lipsky was in such fear of Pacelli that he participated unwillingly in this brutal killing. The question at issue was not Lipsky's guilt but

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2 Appellant also claims that the evidence of the role of the Assistant United States Attorney in the extension of promises to Lipsky was essential to show that Lipsky perjured himself in the June and December 1972 trials when he testified that no promises had been made to him in return for his testimony. Lipsky explained that his erroneous testimony in the two trials was the result of confusion as to what offenses the questions about promised immunity were concerned with. Pacelli argues that this explanation could have been decisively undermined by proof of the Assistant United States Attorney's role since it was that very prosecutor who had asked him the crucial questions. However, the defense here had other evidence which it could have used to challenge Lipsky's explanation. Lipsky had testified in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 95 S. Ct. 1351 (1975), prior to this trial of Pacelli for the murder of Patsy Parks, that he was not confused when he denied that any promises had been made to him in return for his testimony. Based upon Lipsky's *Sperling* testimony, this court on the prior appeal herein characterized Lipsky's explanation that his earlier perjury was unintentional as "a blatant lie." 491 F.2d at 1119. Nonetheless, appellant made no effort to utilize this evidence to impeach Lipsky.

3 Examples of Lipsky's unusual behavior recited in Part III of this opinion also suggest a capacity for violence on his part.

Pacelli's. We consider the refusal of the court to entertain the question to have been within its discretion, particularly in view of the far-ranging latitude permitted here in the cross-examination of Lipsky.

III. Psychiatric Evidence

Pacelli further claims that the trial court committed reversible error in refusing to allow a psychiatrist, Dr. David Abrahamsen, to testify that Lipsky was psychopathic and incapable of telling the truth. Whether or not psychiatric testimony is admissible to impeach the credibility of a witness is within the discretion of the trial judge, see *Hamling* v. *United States*, 418 U.S. 87, 108 (1974), and that judgment will not be disturbed unless it is plainly in error. *United States* v. *Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974); *United States* v. *Butler*, 481 F.2d 531, 535 (D.C. Cir. 1973); *United States* v. *Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1973); *United States* v. *Rosenberg*, 108 F. Supp. 798, 806 (S.D.N.Y.), aff'd, 200 F.2d 666 (2d Cir. 1952), cert. denied, 345 U.S. 965 (1953). We see no error in Judge Stewart's determination not to permit the expert psychiatric testimony sought to be introduced. The psychiatrist testified in the absence of the jury at some length, and a study of this examination, the penetrating cross-examination and the questioning by the court itself compels the conclusion that Judge Stewart properly determined that Dr. Abrahamsen's testimony would be of no use to the jury.[4] The credibility of Lipsky

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4 A pretrial motion for a psychiatric examination of the witness Lipsky was denied by Judge Stewart. This was properly within his discretion. *United States* v. *LaBarbera*, 463 F.2d 988, 990 (7th Cir. 1972); *United States* v. *Russo*, 442 F.2d 498, 503 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972). It is noteworthy that, on the voir dire, Dr. Abrahamsen testified that an examination of Lipsky would not assist him in determining whether he was telling the truth since Lipsky would be

was properly a question for the jury. *United States* v. *Barnard, supra,* 490 F.2d at 913. See also *United States* v. *Bright,* slip op. 3625 (2d Cir., May 21, 1975). The court here charged the jury that, since Lipsky was an accomplice by his own admission, his testimony was suspect. All of the eccentric behavior which indicated to the psychiatrist that Lipsky was incapable of telling the truth was before the jury. Lipsky admitted to the jury that he shot out his television set with a gun because the picture rolled; that he threw a set of scales into Biscayne Bay because of his inability to lose weight; that he held a gun to his brother's head after an argument; that he lost his temper at inanimate objects; and that he described himself in a letter to his sister, which was read to the jury, as "a violent, vindictive, warped-minded cynic of a magnitude that you have absolutely no conception of." He stated that in jail he wished he could go near the "psychos" to "steam them up and laugh at them . . . ." He admitted that he had testified in a prior case that he had used cocaine as often as 20 times in a 24-hour period. He admitted that in jail he had banged his head against a wall because he was angry at an officer. He admitted to the use of false names and to a predilection for watching horror movies, during which he would make faces and noises at the TV screen. This recitation of Lipsky's odd behavior and criminal propensities was all before the jury and the testimony of the psychiatrist could only have involved the jury in a trial within a trial causing further irrelevant distraction. The psychiatrist admitted on cross-examination that 12 average people on a jury would, without the warning of a psychiatrist, recognize that Lipsky's testimony had to be

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self-serving and defensive. In December 1972, Lipsky was examined by two psychiatrists who found no mental defect which interfered with Lipsky's ability to understand the charges made against him, consult with his counsel or cooperate with the court.

reviewed "very carefully indeed." He also stated that a large portion of criminals was psychopathic, so that his diagnosis of Lipsky is hardly surprising. In any event, since he testified that Lipsky, as a psychopath, was unlikely to tell the truth unless it coincided with his own self-interest, it is difficult to see how he could determine, based upon Lipsky's own testimony, what Lipsky's self-interest might be at any particular time or place.[5]

Pacelli's other arguments on appeal are without merit.[6] Affirmed.

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5 Had Dr. Abrahamsen been permitted to testify before the jury the jury might well have been confused by his testimony, as an examination thereof makes clear. Although a complete reading of the transcript establishes that Dr. Abrahamsen's testimony was properly excluded, one example of the reasoning which prompted the decision of Judge Stewart is illuminating. In his testimony below Lipsky was asked: "What does [the oath] mean?" His answer was: "It means you sit here and swear to tell the truth, to the best of your ability and the best of your knowledge and the best of your memory." Dr. Abrahamsen testified that this answer indicated to him that Lipsky "doesn't understand really what it means to tell the truth." The next several pages of the transcript illustrate the inability of the judge to understand the psychiatrist's conclusion. That inability is shared here. How the doctor's conclusion would have been of aid to the jury is far from clear.

6 Appellant suggests, as he did on the prior appeal, that he could not have been convicted on Count One of the violation of 18 U.S.C. § 241 because there is no "right" to be a federal witness. This contention was properly rejected on the prior appeal. 491 F.2d at 1113-15. Appellant also argues that the Government in any case proved no violation of section 241 since it failed to establish that the specific purpose of the conspiracy was to deprive Patsy Parks of her right to testify at trial. We see no need to recapitulate the Government's case against Pacelli. It is enough to say that the Government clearly showed that Pacelli killed Patsy Parks to prevent her from testifying against him.

Appellant also claims (a) that, unless both of the two alleged co-conspirators are guilty, neither can be; (b) that, since there was no evidence that Lipsky knew Parks was to be killed to prevent her from exercising her right to testify, Lipsky could not be guilty of the crime; and (c) that if Lipsky was not guilty, neither was Pacelli. The evidence, however, clearly demonstrates that Lipsky knew that Parks was to be killed to prevent her from testifying. Pacelli told Lipsky after

(Footnote continued on following page)

being informed of the existence of the subpoena that Parks had "ratted [him] out" and that Pacelli knew what he had to do, which Lipsky interpreted as an expression of an intent to do away with Parks.

Appellant argues that Judge Stewart abused his discretion in imposing sentence, since he inadequately disclosed his reasons for imposing a severe sentence. Whatever may be the trial judge's duty in explaining a sentence, see *Dorszynski* v. *United States*, 418 U.S. 424 (1974), it is clear that Judge Stewart acted properly here. He stated, among other reasons, that he was imposing a severe sentence because of the brutality of the offense, a justification which seems to us adequate under the circumstances. Appellant also argues that Judge Stewart should not have considered Pacelli's two prior convictions and that the sentences therefor were influenced by Pacelli's guilt in the murder of Patsy Parks. There is no merit to the first portion of this contention and the second must be rejected because it is based upon mere speculation. Finally, appellant argues that the rule of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) was violated since Pacelli was sentenced below to a term of life imprisonment to run consecutive to Pacelli's sentences on two prior narcotics offenses, whereas the sentence on the first conviction for the murder of Patsy Parks was to run consecutive to only the first of these prior convictions. Assuming that there was any actual increase in the sentence (the two sentences for the Parks murder being both for the length of Pacelli's life), there is no violation of *Pearce* here since the second of Pacelli's narcotics convictions was not returned until after Pacelli was sentenced for the first time on the murder charge. *Pearce* does not require a sentencing court to ignore an intervening conviction on another charge.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-751

VINCENT PACELLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to order a psychiatric examination of the key government witness and in excluding expert psychiatric testimony bearing on the credibility of that witness.

After a second jury trial[1] in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the civil rights of a government witness by causing her death before she could exercise her right to testify, in violation of 18 U.S.C. 241 (Count 1), and of forcibly impeding the giving of testimony by the same witness, in violation of 18 U.S.C. 1503 (Count 2). He was sentenced to a term of life imprisonment on

[1]Petitioner's original convictions for the same offenses were reversed because of the use of inadmissible hearsay evidence. *United States* v. *Pacelli*, 491 F.2d 1108 (C.A. 2). He thereafter sought certiorari on an issue decided against him by the court of appeals, and this Court denied the petition. 419 U.S. 826.

Count 1 and to concurrent term of five years' imprisonment on Count 2. These terms were to be served consecutively to a twenty-year and a fifteen-year term of imprisonment previously imposed upon petitioner for narcotics convictions. The court of appeals affirmed (Pet. App.; 521 F.2d 135).

The evidence at trial showed that on May 27, 1971, Patsy Parks testified before a federal grand jury in the Southern District of New York, which later indicted petitioner, his wife, and two others for narcotics violations (Tr. 70-80).[2] On February 3, 1972, government agents unsuccessfully attempted to serve Parks with a subpoena for her appearance at petitioner's trial on the narcotics charges, then scheduled to begin on February 8, 1972 (Tr. 82-84, 93-95, 124-126). Shortly after midnight on February 4, 1972, Parks, who had learned of the attempted service, went to the Hippopotamus, a New York discotheque, where she approached Barry Lipsky and told him that she urgently wanted to see petitioner about the subpoena (Tr. 126-129, 135, 170-171, 209-212, 219-222, 805-806). Lipsky, who was then employed by petitioner in the narcotics business, responded that petitioner could not be reached by telephone, that he planned to meet him later in the day, and that he would tell petitioner that Parks wanted to speak to him. Parks, however, insisted that she had to see petitioner that very night (Tr. 214, 223-225).

Lipsky went to petitioner's apartment and told him that Parks was at the Hippopotamus, that some men had at-

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[2]Parks testified before the grand jury that on April 22, 1971, petitioner had received a box of money from Frank Cerano at her apartment, and that on April 18, 1971, petitioner and others had been in and out of her apartment several times in an attempt to resolve a problem over returning to Detroit or Chicago a paper bag full of money that had been stashed in her apartment (Tr. 76-80).

tempted to subpoena her, and that she wanted petitioner's advice (Tr. 226-228). Petitioner immediately responded, "It's that box. It's that God-damned box. She has been to the grand jury and she ratted me out. I know what I have to do" (Tr. 228-229). Petitioner asked Lipsky if he wanted to go with him, and Lipsky agreed. They then drove in petitioner's rented car to the discotheque, stopping en route to buy four one-gallon cans of gasoline after petitioner told Lipsky that they would need it to burn Parks' body. The two then continued on to the Hippopotamus, where they arrived between 2:00 and 2:30 a.m. on February 4 (Tr. 229-237, 756-757, 762-766, 775-776).

Lipsky entered the Hippopotamus, found Parks, told her that petitioner was parked nearby, and asked her to wait a few minutes before meeting him there. Parks left the discotheque and was followed shortly by Lipsky. When Lipsky arrived at petitioner's car, petitioner was behind the wheel and Parks was seated next to him. After Lipsky got in the back seat petitioner drove toward Long Island (Tr. 237-242, 809).

During the drive, petitioner questioned Parks about her knowledge of his pending narcotics prosecution, about the box, and about the attempt to serve her with the subpoena. He also offered her money to go to Brazil or California, but Parks refused. After driving for approximately an hour, petitioner stopped the car on a dirt road and pretended to make a telephone call at a nearby phone booth. Upon returning to the car, petitioner got into the back seat and Lipsky moved to the driver's seat. As soon as Lipsky drove off, petitioner raised up over the front seat, wrapped his left arm around Parks' head, and plunged a knife once into her neck and a dozen more times into her chest (Tr. 242-250, 1004-1006, 1016). Petitioner then instructed Lipsky to drive to a deserted wooded area, where they pulled Parks' body onto the roadway, doused it with gasoline, and ignited it (Tr. 250-253).

Petitioner's defense essentially was an attack upon the competency and credibility of Lipsky, the key government witness. In a pre-trial motion, which was renewed at trial (Tr. 654-655), petitioner sought to have Lipsky examined by a psychiatrist, Dr. David Abrahamsen, in order to aid the district court in its determination of Lipsky's competency to testify as a witness. The court refused to order the requested examination or to admit the proffered testimony of the psychiatrist (Tr. 655, 1232) who, through observation of Lipsky and a review of his testimony, had diagnosed him as a pathological liar.

1. Petitioner contends (Pet. 10-13, 16) that the district court committed reversible error in refusing to order Lipsky to submit to a psychiatric examination before permitting him to testify. The determination of the competency of a witness, however, is addressed to the discretion of the trial court, which is under no obligation to order a mental examination or to seek other evidence in deciding the issue. See, *e.g.*, *United States* v. *Barnard*, 490 F.2d 907, 912 (C.A. 9), certiorari denied, 416 U.S. 959; *United States* v. *Heinlein*, 490 F.2d 725, 730 (C.A.D.C.); *United States* v. *Butler*, 481 F.2d 531, 534 (C.A.D.C.); *United States* v. *Benn*, 476 F.2d 1127, 1130-1131 (C.A.D.C.); *United States* v. *LaBarbera*, 463 F.2d 988, 990 (C.A. 7); *United States* v. *Skillman*, 442 F.2d 542, 560 (C.A. 8), certiorari denied, 404 U.S. 833; *United States* v. *Russo*, 442 F.2d 498, 503 (C.A. 2), certiorari denied, 404 U.S. 1023.[3]

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[3]Petitioner's contention (Pet. 16) that there exists a conflict among the circuits on this issue is erroneous, since none of the decisions on which he relies has imposed a duty on the trial court to conduct a mental examination of a prosecution witness. In *United States* v. *Butler*, 481 F.2d 531 (C.A.D.C.), and *United States* v. *Benn*, 476 F.2d 1127 (C.A. D.C.), the court of appeals affirmed the defendants' convictions, holding that the district court's refusal to order an examination was within its discretion. Furthermore, petitioner's assertion (Pet. 12)

Indeed, the modern trend of decisions, as reflected in the Federal Rules of Evidence, is that incompetency is no longer a ground for disqualifying a witness in a criminal trial and that a preliminary examination into competency is therefore unnecessary. See, *e.g.*, Rule 601, Fed. R. Evid.; *United States* v. *Jones*, 482 F.2d 747, 751-752 (C.A. D.C.); *United States* v. *Davis*, 486 F.2d 725, 726 (C.A. 7), certiorari denied, 415 U.S. 979; *United States* v. *Davis*, 473 F.2d 1023, 1025 (C.A. 10). As the Advisory Committee's Note to Rule 601 of the Federal Rules of Evidence explains, the question of a witness' mental qualifications "is one particularly suited to the jury as one of weight and credibility." Petitioner's extensive cross-examination of Lipsky (Tr. 294-679, 720-733), most of which was devoted to Lipsky's credibility rather than to his eyewitness account of the crimes, fairly gave the jury the "opportunity to appraise the credibility of the witness in the light of the facts impugning his veracity." *United States* v. *Russo*, *supra*, 442 F.2d at 502.

In any event, as the district court noted in denying petitioner's request for a psychiatric examination of Lipsky, petitioner had "not made out a good enough case" (Tr. 655) to overcome the presumption against such examinations. The court's conclusion is clearly correct, since (1)

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that a hearing was required because Lipsky was addicted to cocaine is unsupported by the record. The only evidence of Lipsky's use of cocaine was his testimony that he had last used cocaine on March 2, 1972 (almost three years before trial) and that he had not taken narcotic drugs of any kind during the trial (Tr. 295, 425). The present case is therefore distinguishable from *Hansford* v. *United States*, 365 F.2d 920 (C.A.D.C.), where it was held to be error to fail to conduct a hearing on the competency of the *defendant* after it was shown that he had a life history of narcotics addiction and that he had been using narcotics throughout the trial. See also *Gurleski* v. *United States*, 405 F.2d 253, 267 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977.

Lipsky previously had testified exhaustively in five recent trials, before different district judges, involving petitioner and others (Tr. 68, 286-287, 299-300, 314, 353-359, 426, 588-589); (2) Lipsky had undergone a court-ordered psychiatric examination in December 1972 and had been found competent to stand trial for Parks' murder (Tr. 374-375, 389, 420-421, 960-961, 1181-1182); (3) Dr. Abrahamsen, the psychiatrist called by petitioner, specifically testified that an examination of Lipsky would not have assisted him in forming his conclusions about Lipsky's mental condition (Tr. 1155); and (4) Lipsky's testimony was corroborated by other evidence in the case.[4] See *United States* v. *Gerry*, 515 F.2d 130, 137 (C.A. 2), certiorari denied, No. 74-1480, October 6, 1975.

2. The district court also properly refused to allow Dr. Abrahamsen to testify that, in his opinion, Lipsky suffered from a psychopathic disorder that prevented him from telling the truth. This Court has recently reiterated the accepted rule that "the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testi-

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[4]The court of appeals noted (Pet. App. 5090; 521 F.2d at 137):

> Parks was placed by witnesses in the Hippopotamus on the night and at the time testified to by Lipsky; the night attendant at the gasoline station identified Lipsky as the purchaser of four gallon cans of gasoline at about 2:30 a.m. one morning; a knife was found in the mud of a bay area two blocks from Pacelli's residence where Lipsky stated they had disposed of the murder weapon. There was also evidence that the same rented car in which the murder was committed was again rented by Pacelli's drug partner, Al Bracer, on February 16, 1972 and was found engulfed in flames two days later in Fairfield, New Jersey, at a time when Lipsky was hiding in Florida. Chemical inspection disclosed that there was gasoline throughout the interior of the car and indicated, although not conclusively, that traces of blood were present on the floor carpet.

mony." *Hamling* v. *United States*, 418 U.S. 87, 108. The court's exercise of discretion in such matters may not be overturned "unless manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35. See also *United States* v. *Barnard, supra*, 490 F.2d at 912-913; *United States* v. *Benn, supra*, 476 F.2d at 1130-1131. Here, the court issued its ruling after it had conducted an extensive preliminary hearing out of the presence of the jury (Tr. 1122-1232), which revealed that the psychiatrist's testimony would be "of no use to the jury" (Tr. 1232).

The trial court's finding that Dr. Abrahamsen's expert testimony was unnecessary, which the court of appeals expressly affirmed after its independent review of the psychiatrist's *voir dire* examination (Pet. App. 5096-5099; 521 F.2d at 140-141), was within its discretion. The general test for admissibility of such testimony is whether it will be of appreciable help to the jury in an area "beyond the ken of the average layman * * *." *United States* v. *60.14 Acres of Land*, 362 F.2d 660, 667 (C.A. 3), quoting from *Jenkins* v. *United States*, 307 F.2d 637, 643 (C.A.D.C.). In *Salem* v. *United States Lines Co., supra*, 370 U.S. at 35, the Court stated:

> [E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training * * *."

Here, the psychiatrist's diagnosis that Lipsky was a pathological liar was based totally upon facts that had been brought out before the jury (Pet. App. 5097; 521 F.2d

at 140-141),[5] which also was charged that, since Lipsky was an accomplice by his own admission, his testimony was suspect. As Dr. Abrahamsen himself conceded (Tr. 1182-1185), even without his testimony the jury was fully capable of determining whether Lipsky's account of any given event was true. Thus, receipt of the "expert" diagnosis may have caused the jury "to surrender [its] own common sense in weighing testimony," *United States* v. *Barnard, supra*, 490 F.2d at 912, and, as the court of appeals concluded, "could only have involved the jury in a trial within a trial causing further irrelevant distraction" (Pet. App. 5097; 521 F.2d at 141).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]Indeed, Dr. Abrahamsen's conclusion that Lipsky was incapable of telling the truth relied primarily upon *Lipsky's* trial testimony that he had repeatedly lied in the past, had frequently used cocaine, and had engaged in several episodes of eccentric behaviour (Tr. 1153-1155, 1171-1173, 1177-1179, 1185-1187).

[6]*United States* v. *Partin*, 493 F.2d 750 (C.A. 5), and *United States* v. *Crosby*, 462 F.2d 1201 (C.A. D.C.), on which petitioner relies (Pet. 16), involve dissimilar situations. In *Partin*, the court of appeals held that a psychiatrist could testify that a witness suffered from a mental disorder, documented by hospital records, that affected his ability to see and hear the events he was reporting to the jury. Petitioner does not claim that Lipsky could not perceive reality—only that he lied about it. In *Crosby*, the court of appeals held that, in determining the competency of a key government witness who was shown to have used drugs on the day of the trial, the trial court erred in refusing to examine an existing medical record of the witness.